

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RUSSELL GANN)	
Claimant)	
)	
VS.)	
)	
USF DUGAN)	
Respondent)	Docket No. 245,887
)	
AND)	
)	
TRAVELERS INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the July 25, 2008 Order¹ by Administrative Law Judge (ALJ) Nelsonna Potts Barnes.

APPEARANCES

W. Walter Craig, of Derby, Kansas, represents the claimant. William L. Townsley, of Wichita, Kansas, represents respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record presented to the ALJ, which includes the transcripts from the hearings held on July 22, 2008, July 26, 2007, and May 17, 2007 along with the parties' briefs filed in connection with those proceedings and including the parties' briefs to the Board in connection with the instant appeal.

¹ This Order was the result of a Post-Award Medical Hearing.

ISSUES

The ALJ awarded claimant's attorney post-award attorney fees in the amount of \$3,200 which reflects 21.33 hours of work performed in connection with claimant's post-award medical proceeding from April 10, 2006 to August 31, 2007 at an hourly rate of \$150.

The respondent requests review of whether the ALJ exceeded her authority in awarding attorney fees and whether attorney fees may be awarded pursuant to K.S.A. 44-536 under the facts. Respondent also suggests the award was excessive and should be reversed.

Claimant argues that the Order should, at a minimum, be sustained. In the alternative, claimant contends the Order should be modified to award counsel the original request of \$5,100 in post-award fees for 34 hours, plus an additional 3 hours at \$150.00 an hour for this appeal by respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The present dispute between the parties stems from a miscommunication with the billing procedures for claimant's medications. Respondent had been directed to provide the medications prescribed by claimant's treating physician, Dr. Jon Parks. Accordingly, respondent had voluntarily set up an automatic billing procedure so that claimant could obtain the medications without any ongoing involvement by his lawyer or the insurance carrier's adjuster. However, when there was a change in respondent's ownership and in the third party administrator who normally handled the billing, this billing procedure was interrupted and the files were reassigned to another company.

This interruption of service resulted in claimant going without medications from April 10, 2006 to May 15, 2006. According to his counsel, claimant became ill and was bedridden during this time.² In spite of this interruption in service, claimant paid for at least some of his medications from his own funds.

Claimant contacted his attorney who, in turn, contacted the new adjuster on the file. Apparently their conversation was less than satisfactory. Ashley Ott, the adjuster on the file, purportedly informed claimant's attorney that the files would be handled in alphabetical order and that regardless of his circumstances, claimant's would not be prioritized. At a

² P.A.H. Trans. (July 22, 2008) at 7.

hearing claimant's counsel characterized Ms. Ott as "very flippant and callous."³ This exchange caused claimant's attorney to do a number of things.

On April 26, 2006, claimant mailed a Subpoena Duces Tecum to Ms. Ott in St. Louis, Missouri, directing her to appear in Wichita, Kansas on May 16, 2006. On May 3, 2006 claimant filed an Application for Post-Award Medical seeking reimbursement of the out-of-pocket costs incurred in paying for his medications. A Motion to Show Cause was also filed along with a notice for hearing on May 16, 2006. And finally, claimant's counsel registered a complaint with the Division's Fraud and Abuse department.

The Post-Award Medical and Show Cause issues were set to be heard on May 16, 2006. But by this time, the automatic payment procedures had been reestablished and claimant's medical issue was resolved. Nonetheless, claimant's counsel continued to maintain that Ms. Ott should be required to testify. The hearing originally set for May 16, 2006 was continued because it was revealed that Ms. Ott was pregnant and could not travel. That hearing was continued by the parties a number of times and it was not until May 17, 2007, that the parties again appeared before the ALJ, this time on the issue of Ms. Ott's subpoena and respondent's Motion to Quash.

The ALJ issued an order quashing the deposition request and denied claimant's Motion to Show Cause. Claimant's request for post-award attorney's fees was noted, but because there was no itemization, it was taken under advisement until an itemization of hours and expenses" was provided.⁴

Claimant's counsel filed a Motion to Reconsider and after a hearing, that too was denied. The ALJ's Order was then appealed to the Board, but after the matter was docketed and the period for filing briefs was extended by the parties, the parties dismissed that appeal on August 31, 2007.

From August 13, 2007 until June 4, 2008, claimant's counsel spent over 13 hours communicating with the Fraud and Abuse department regarding this claim. He has also communicated with the Kansas Department of Insurance.

Then, on July 22, 2008, the parties appeared on the issue of claimant's counsel's post-award attorney's fees. The itemization prepared by claimant's counsel is clearly a recreation of dates and entries rather than something that is regularly prepared in the course of business. It includes entries dating from April 10, 2006, the date claimant first learned his prescription procedure had been interrupted, to June 6, 2008, the date he filed his post-award motion for attorney's fees. Included among these billings is an entry for 10

³ *Id.* (May 17, 2007) at 6-8.

⁴ ALJ Order (July 3, 2007) at 2.

hours to review and draft a complaint to the Kansas Department of Insurance. There are also entries pertaining directly to the suspension of claimant's prescriptions, the subpoena to Ashley Ott, the numerous continuances of that issue as well as the actual hearings.

Claimant's counsel is asking for a total of \$5,100 for 34 hours of time, billed at \$150 per hour over a 26 month period. Respondent's defense to this request is simple: claimant's prescriptions were never denied in April 2006. There was a miscommunication which was corrected by May 15, 2006 and even in that month, claimant was able to *acquire* his medications, albeit at his own cost, and those costs were reimbursed and the matter resolved by May 15, 2006. Everything that occurred after May 15, 2006 constitutes nothing more than a scorched earth policy, involving procedures that do not belong within the administrative process and are more properly dealt with outside the workers compensation arena. In short, the post-award attorney's fees statute is not meant to address "quixotic pursuit[s] of remedies which, as a matter of law, were simply not available."⁵

The ALJ reviewed this matter and concluded that claimant's attorney was entitled to attorney fees for 21.33 hours of work performed on claimant's post-award medical proceedings from April 10, 2006 to August 31, 2007.⁶ She concluded that claimant was entitled to a reasonable attorney fee in the amount of \$3,200. The period she references reflects the initial attempt to address the failure of the billing system which denied claimant immediate payment of his prescriptions and continuing to the date that the parties withdrew their appeal as to the ALJ's Order addressing claimant's complaints in the handling of that billing system failure. It is the Order involving the award of attorney's fees that is at issue in this appeal.

K.S.A. 44-536(g) provides that:

In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis.

This statute vests the ALJ with discretion to determine the reasonableness of a fee, both in terms of time spent on the disputed issue and the rate within the locality. Obviously when litigants are in the heat of battle the lines between issues are more difficult to see.

⁵ Respondent's Brief at 13 (filed Sept. 4, 2008).

⁶ ALJ Order (July 25, 2008).

Here, claimant's counsel was using a "shot gun" approach in an attempt to deal with what he believed was an inappropriate and callous attitude by the insurance adjuster. He not only subpoenaed her to appear on a Motion to Show Cause, but ultimately a complaint was filed with the Fraud and Abuse department within the Division as well as with the Kansas Department of Insurance. Only after a great deal of time was spent (and over two years passed) was a request for fees presented.

In addressing this issue, the ALJ differentiated between the time spent on the underlying issue of the prescription expense and the ultimate resolution of that dispute on August 31, 2007 when the parties dismissed their appeal with the Board and claimant's counsel's decision to file complaints with other agencies or investigative groups. With that delineation, she was able to ascertain the time spent and that figure resulted in an award of \$3,200, at claimant's counsel's requested rate of \$150 per hour.

Respondent does not dispute the reasonableness of the rate, nor the time spent. Respondent's argument is, however, aimed at the futility of claimant's request. Specifically that claimant got his prescriptions, nothing was denied him and the rest of counsel's machinations are in pursuit of remedies that are not available under the Workers Compensation Act. Respondent contends that contempt powers are not available to an ALJ. And the effort expended to achieve the unachievable remedies should not be rewarded.

After reviewing the entire file and the parties' briefs along with counsel's itemization of time, the Board finds the ALJ's Order should be affirmed. What the ALJ did is entirely logical and consistent with the intent of K.S.A. 44-536(g). Claimant's authorized medical prescriptions were inexplicably suspended and it required assistance of his lawyer to get those prescriptions reinstated and the process reestablished. The statute provides that a reasonable fee *shall* be paid by respondent in connection with that effort. But that issue was, at least between the two parties to this litigation, resolved on August 31, 2007, when both parties dismissed their appeal to the Board. At that point, the Motion to Show Cause and the Motion to Quash (both relating to Ms. Ott's subpoena) were moot and the only issue remaining was the fees associated with the post-award proceeding under K.S.A. 44-536(g). The ALJ addressed that issue when presented with an itemization and she, quite logically, awarded fees for 100 percent of the time incurred in that effort from April 10, 2006 to August 31, 2007 when the appeal of the underlying order was dismissed. In doing so, she rejected any claim for time spent after that appeal was dismissed. In this instance, those efforts did not further claimant's post-award request for prescription benefits.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated July 25, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: W. Walter Craig, Attorney for Claimant
 William L. Townsley, Attorney for Respondent and its Insurance Carrier
 Nelsonna Potts Barnes, Administrative Law Judge